United States Court of Appeals

for the

District of Columbia Circuit

TRANSCRIPT OF RECORD

580

BRIEF FOR APPELLANT

IN THE

UNITED STATES COURT OF APPEALS

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 22,732

Perry A. Grant, Appellant,

v.

United States of America, Appellee.

APPEAL FROM JUDGMENT OF THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF COLUMBIA

United States Court of Appeals
for the District of Columbia Circuit

FILED JUN 9 1969

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STATEMENT OF ISSUES PRESENTED FOR REVIEW

1. Was the evidence sufficient to establish Grant's guilt of petit larceny beyond a reasonable doubt?

2. Was admission for impeachment of Grant's prior conviction of unauthorized use of a vehicle, the same crime for which he was on trial, an abuse of the trial judge's Luck discretion?

3. Was it plain error for the trial judge, in exercising Luck discretion, to fail to consider the special problem presented by a possible instruction on the inference of guilt from unexplained possession of recently stolen property?

This case has not previously been before this Court under the same or similar title.

STATEMENT OF THE CASE

I. Summary of proceedings below.

Appellant Perry A. Grant ("Grant") was indicted on one count of unauthorized use of a vehicle, D.C. Code § 22-2204 (1967), and one count of grand larceny, D.C. Code § 22-2201 (1967). After pleading not guilty to both counts, Grant was tried before a jury in the United States District Court for the District of Columbia. During the trial a question arose as to the value of the property alleged to have been stolen, and the trial judge reduced the charge of grand larceny to petit larceny (Tr. 83). Grant was convicted of unauthorized use of a vehicle and petit larceny, and sentenced to serve concurrent terms of one to three years and one year, respectively.

The District Court had jurisdiction pursuant to D.C. Code § 11-521 (1967). Grant filed a timely notice of appeal. This Court has jurisdiction pursuant to 28 U.S.C., §§ 1291, 1294 (1964), 62 Stat. 929, 930, as amended (1948).

II. Statement of facts relevant to the issues presented for review.

At approximately 6:20 A.M. on Tuesday, July 2, 1968, Mrs. Bernice Briguglio left her biege 1966 Chevrolet two-door Impala at the entrance of the Belleview Parking Lot at 15th and E Streets, N. W. in the District (Tr. 27-28). As was her custom, she left the key in the ignition so that an attendant could take her car into the lot (Tr. 29). The trunk key was on a key chain with the ignition key (Tr. 32). She did not see whether an attendant actually took her car into the garage that morning (Tr. 29).

Mrs. Briguglio testified that on the morning of July 2 she had "several belongings" in her car (Tr. 29). A raincoat was "laying loose in the back of the seat;" three inflated snow tires on rims, a spare tire, a set of dishes, snow boots, and boys' winter clothing were in the trunk (Tr. 30-31). She had looked in the trunk the previous Sunday (Tr. 38).

When Mrs. Briguglio returned to the parking lot at approximately 3:20 P.M. on July 2, her car was missing (Tr. 33, 40). She called the police (Tr. 33). The police called her the following Saturday, July 6 (Tr.

38). She next saw her car the following day at 12th Precinct Headquarters (Tr. 41). When she examined the car at that time, "a car jack was in the car. That is all that belonged to me. There were other objects in there, but they didn't belong to me" (Tr. 35).

At approximately 10:15 P.M. on July 6, 1968, two Metropolitan Police Officers, Roland W. Perry and Zeffie Davis, were on duty in a patrol wagon in the 1300 block of Franklin Street, N. E. in the District. They observed a person they identified as Grant and two youths entering a 1966 two-door Chevrolet (Tr. 43, 62). They followed the car. When it passed a stop sign at the corner of Second and Channing Street, N. E. they turned on the red light and sounded the siren (Tr. 44).

The driver and the two youths jumped out of the car while it was still in motion and ran into an alley (Tr. 47, 63). The car ran into a tree (Tr. 44). The keys were in the ignition (Tr. 48).

Officer Davis jumped out of the patrol wagon and followed the suspects on foot, while Officer Perry continued to cruise in the vicinity (Tr. 55, 63). Grant and two juveniles were apprehended coming out of another nearby alley a few minutes later (Tr. 45, 64-65). Officer

Davis testified that he never lost sight of the suspects (Tr. 69).

Neither Grant nor the two juveniles who were apprehended with him had with them any property that might have belonged to Mrs. Briguglio (Tr. 58, 59). Officer Perry first examined the trunk of the car after Mrs. Briguglio opened it at the 12th Precinct Headquarters (Tr. 48). He did not notice any property belonging to Mrs. Briguglio in the trunk (Tr. 48).

At the conclusion of the Government's case, defense counsel advised the trial judge that Grant intended to take the stand and that the prosecutor intended to impeach his credibility through a 1967 conviction of unauthorized use of a motor vehicle (Tr. 78-79). After a colloquy with defense counsel (Tr. 78-82, reproduced as Appendix I), the trial judge ruled that he would "permit the prior conviction to be used by the prosecution if the defendant takes the stand" (Tr. 82).

Grant testified that he had been in Philadelphia with friends at a party on July 2, 1968, arriving about 6:00 in the morning and leaving that night (Tr. 87).

On the evening of July 6, Grant and a young friend, Kevin Taylor (alias David Smith), left the home of

William Taylor at 1343 Franklin Street to go to a store (Tr. 92, 93). The store was closed (Tr. 93). They then went to the home of a friend of William Taylor to borrow something (Tr. 92). Returning to William Taylor's home, they met a friend of Kevin Taylor (Tr. 89-90). The three took a short cut through an alley and, when they reached the end of the alley, Officer Davis "jumped out of the bushes with a pistol in his hand" and arrested them (Tr. 90). Grant testified that he had not taken Mrs. Briguglio's car from a parking lot, that he had never driven the car, and that he did not know what the car looked like (Tr. 94-95, 105).

On cross examination of Grant, the following exchange took place (Tr. 104):

> Q Are you the same Perry Grant who on November 3rd, 1967 was found guilty after trial of unauthorized use of an automobile?
>
> A You have the record there. You answer.
>
> Q Sir, I asked you the question. Are you?
>
> A Yes.

On the morning of the second day of trial, the trial judge granted defense counsel's motion for a recess until

two juvenile defense witnesses--Kevin Taylor and Ralph Slaughter--were transported from Cedar Knoll School to the Court House (Tr. 154).

Kevin Taylor, who was arrested with Grant on the evening of July 6, testified that he and Grant walked to a store at 4th and Rhode Island Ave., N. E. and bought some cigarettes (Tr. 165). They then went to the house of a friend of Taylor and were coming back through an alley when they were arrested (Tr. 165, 166). When they were arrested, they were with a friend of Taylor's named Mark McNeil (Tr. 166, 171). Taylor denied being in a car with Grant on the evening of July 6 and denied knowing anything about Mrs. Briguglio's car (Tr. 167). He stated that the arresting officer came from around the corner of the alley rather than from behind them (Tr. 172-173).

Ralph Slaughter, Taylor's cousin, testified that he had seen and stopped to talk with Grant, Taylor and McNeil "walking out of the alley or something like that from Lincoln Road" between 9:30 and 10:00 on the evening of July 6 (Tr. 181, 183, 184-85).

ARGUMENT

I. The evidence was insufficient to support Grant's conviction of petit larceny.

(The Court's attention is directed to pages 27-41, 48, and 58-59 of the reporter's transcript.)

The elements of the offense of larceny in the District of Columbia include: (1) a taking of valuable property from one rightfully possessed, (2) a carrying away of this property, and (3) the accomplishing of the taking and carrying away with an intent to appropriate the property to a use inconsistent with the rights of the rightful possessor. Mitchell v. United States, ___ U.S.App.D.C. ___, 394 F.2d 767, 770 (1968). Guilt must be established beyond a reasonable doubt. Unless that result is possible on the evidence, the trial judge must not let the jury act. The trial judge must not let the jury act on what would necessarily be only surmise and conjecture, without evidence. Campbell v. United States, 115 U.S.App.D.C. 30, 32, 316 F.2d 681, 683 (1963); Cooper v. United States, 94 U.S.App.D.C. 343, 346, 218 F.2d 39, 42 (1954); see Curley v. United States, 81 U.S.App.D.C. 389, 392-93, 160 F.2d 229, 232-33 (1947), cert. denied, 331 U.S. 837 (1947).

In this case, no evidence was submitted upon which the jury could conclude that Grant took any property out of Mrs. Briguglio's car or that he carried it away. Considering the evidence in the light most favorable to the Government, the jury might have found that certain property belonging to Mrs. Briguglio was in her car on the morning of July 2, that Grant drove her car for a short period on the evening of July 6, and that Mrs. Briguglio's property was not in her car when she examined it on July 7. There was no evidence that Grant removed Mrs. Briguglio's car from the Belleview Parking Lot on July 2, that he took her property from the car, or that he ever had possession of her property.

From Mrs. Briguglio's testimony that the trunk key, on a key chain with the ignition key, was left in the car on July 2 and Officer Perry's testimony that the keys to the car were in the ignition when it was recovered by the police four days later, the jury might have inferred that Grant had access to the trunk at some time.

But the further inference that Grant took her property and carried it away could only have been surmise and conjecture.*

Grant's possible access to the trunk may have raised a suspicion that he took Mrs. Briguglio's property and carried it away. But as Judge Prettyman stated in Hiet v. United States, 124 U.S.App.D.C. 313, 314-15, 365 F.2d 504, 505-06 (1966):

> . . . [A] suspicion, even a strong one, is not enough. Guilt must be established beyond a reasonable doubt, and each and every element of the offense charged must be established beyond a reasonable doubt. The crime of larceny is that the accused did "take and carry away" something of value. Obviously one element of the crime is that the accused took the property; not that he was at some time in the vicinity of the property but that he took it and carried it away.
>
> . . . In the case at bar there was on the evidence in the record a reasonable

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* Although the prosecutor told the jury in his closing argument "you can reasonably draw the inference that the property was stolen by the person who also took and was using the car" (Tr. 198), the trial judge limited his instruction on the inference from unexplained possession of recently stolen property to the charge of unauthorized use of a vehicle: "This [inference] applies only to the count that concerns the unauthorized use of the vehicle. It does not concern the question of the charge with respect to petty larceny on the contents of the car" (Tr. 216).

> doubt that Hiet took the property; indeed there was no evidence whatsoever that he took it or carried it away. Without any evidence whatever connecting Hiet with the missing property, I think there is necessarily a doubt (more than a reasonable one, I think) that he took it and carried it away. The doubt is not a visceral or moral one; it is a doubt upon the record; the lack of essential proof creates the doubt as a legal matter. So the judgment must be reversed.

Because the evidence in this case was not sufficient to establish Grant's guilt of petit larceny beyond a reasonable doubt, his conviction of that charge must be reversed. FED. R. CRIM. P. 52(b).

II. Admission for impeachment of Grant's prior conviction of unauthorized use of a vehicle, the same crime for which he was on trial, was an abuse of the trial judge's Luck discretion.

(The Court's attention is directed to pages 78-82 of the reporter's transcript, reproduced as Appendix I to this brief.)

The Luck doctrine gives a trial judge discretion, after consideration on the record, to determine whether a defendant's prior convictions can be introduced to impeach his credibility under D.C. Code § 14-305 (1967). Luck v. United States, 121 U.S.App.D.C. 151, 348 F.2d

763 (1965). As this Court recently observed in (Lawrence) Jones v. United States, ___ U.S.App.D.C. ___, 402 F.2d 639, 642 (1968):

> The twin concerns behind the doctrine are that the cause of truth may be "helped more by letting the jury hear the defendant's story than by the defendant's foregoing that opportunity because of the fear of prejudice founded upon a prior conviction," and that the "prejudicial effect of impeachment [may] far outweigh the probative relevance of the prior conviction to the issue of credibility." 121 U.S. App.D.C. at 156, 348 F.2d at 768.

In Gordon v. United States, 127 U.S.App.D.C. 343, 383 F.2d 936 (1967), cert. denied, 390 U.S. 1029 (1968), this Court announced guidelines to assist trial judges in making Luck determinations. Among other things, it indicated as a "rule of thumb" that convictions which rest on dishonest conduct such as fraud, cheating or stealing, relate to credibility, whereas those of violent or assaultive crimes generally do not. 127 U.S. App.D.C. at 347, 383 F.2d at 940.

This Court also recognized in Gordon that admission for impeachment of a prior conviction involving the same conduct for which an accused is on trial creates an "inevitable pressure on lay jurors to believe that 'if

he did it before he probably did so this time'" Ibid.* Because the danger of prejudice is acute, this Court stated "as a general guide" that "those convictions which are for the same crime should be admitted sparingly," and that one solution might be to limit "impeachment by way of a similar crime to a single conviction and then only when the circumstances indicate strong reasons for disclosure, and where the conviction directly relates to veracity." Ibid.

A. The trial judge failed to determine on the record that the value of impeaching Grant's testimony through his prior conviction for the same crime outweighed its inevitable prejudice to him.

Defense counsel urged that Grant's prior conviction for unauthorized use of a motor vehicle would be "highly prejudicial" to Grant because it was the same crime for which he was on trial, referring to Gordon by name (Tr.

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* Evidence that this pressure is not limited to jurors might be found in the trial judge's gratuitous observation to the jury after they returned the guilty verdict, "This Defendant has an extensive record of car theft and car tampering over a substantial period of his life and he is serving a sentence now in connection with one of those offenses." (Tr. 226).

78-79). "The jurors," he said, "may feel or come to the conclusion that since the defendant was convicted of this offense once before, he more than likely would do it again" (Tr. 78). The trial judge's response discloses that he misconstrued the Gordon decision. He stated (Tr. 79-80):

> That submission to me . . . says that where a man decides to confine his criminal pursuits to stealing, which is what this man has been doing, he can stand trial without his record coming in if he just continues to steal cars.
>
> Now I don't read the Gordon case or the Luck case as saying that. . . . [I]f that were the rule, as broadly as you state it to me, it would say that any criminal who decides to become a specialist in a particular field of felony can with assurance continue to testify without regard to his record coming in. I don't think that is the rule.

That indeed is not the rule. Gordon called upon the trial judge, in exercising Luck discretion, to consider carefully a prior conviction for similar conduct because of the acute danger of prejudice that inevitably results from its admission. Gordon presumably called for the kind of deliberation involved in Weaver v. United States, No. 22,172 (D.C.Cir., decided Jan. 22, 1969), where the trial judge admitted a prior robbery conviction in a robbery

trial. This Court refused to disturb the trial judge's determination because (Slip Opinion p. 5):

> The court dealt with the question of the robbery conviction at length, and articulated with some care the basis for its ruling. It quite correctly took note of the special problems raised by prior convictions for the same crime as the one for which a defendant is currently on trial--problems which it thought might be ameliorated by admitting only one such prior conviction, as was the case here. On the question of whether robbery has any implications for veracity, the court fairly and accurately identified our comments on the subject in Gordon, . . . and expressly relied upon them. We think it was entitled to do so.

By contrast, the trial judge in this case apparently assumed that the probative relevance of Grant's prior conviction to the issue of credibility outweighed the prejudicial effect of impeachment through evidence of his prior conviction for the same crime simply because the prior conviction involved the same crime. He failed to heed Gordon's warning that a prior conviction for the same crime raises "special problems" of prejudice to a defendant and requires Luck discretion to be exercised with particular care.

B. The trial judge failed to determine that there were strong reasons for impeachment in this case and did not properly consider whether Grant's prior conviction directly related to veracity.

Contrary to Gordon's directive, the trial judge made no determination that the circumstances of this case indicated strong reasons for disclosure of Grant's prior conviction for the same crime. Nor did he attempt seriously to consider whether that conviction directly related to veracity.

In fact, Grant's prior conviction of unauthorized use of a vehicle did not relate directly to veracity. In (Roy) Jones v. United States, ___ U.S.App.D.C. ___, 404 F.2d 212 (1968), Jones had been charged with unauthorized use of an automobile. After considering the Luck issue, the trial judge excluded a previous conviction of breaking and entering but allowed questioning regarding two prior convictions of larceny. Jones' conviction was affirmed. Judge Wright, concurring, noted that the question whether the conduct involved in unauthorized use of a motor vehicle was the same as or similar to that involved in Jones' prior larceny convictions had not been raised in the trial court. He nevertheless referred to

the language from Gordon quoted above (p. 15) and observed, "Stealing, as Gordon indicates, 'reflects adversely on a man's honesty and integrity,' but is not 'directly relate[d] to veracity.'" ___ U.S.App.D.C., ___, 404 F.2d at 216 (concurring opinion). Similarly, Grant's prior conviction of unauthorized use of a vehicle may have been regarded as one which reflected on his honesty and integrity and therefore related to his credibility, but it was not "directly relate[d] to veracity" within the meaning of the Gordon decision, as a conviction for perjury or forgery might have been.

This Court observed in Gordon that the relevance of prior convictions to credibility may be different as between one that involved guilt by a plea and one in which the accused affirmatively contested the charge. It stated that a jury's guilty verdict is "in a sense a de facto finding that the accused did not tell the truth when sworn to do so," but only in cases where "the accused testifies so that the jury's verdict amounted to rejection of his testimony." 127 U.S.App.D.C. at 347 n. 8, 383 F.2d at 940 n. 8. The difficulty with this test is, of course, that it may indicate that a prior conviction

is relevant to credibility without regard to the question whether the prior conviction involves a crime of dishonesty or a crime of violence. This test therefore appears to be inconsistent with the "rule of thumb" distinguishing between these crimes to determine their relevance to credibility.

Even if it is assumed that a jury's rejection of a defendant's testimony in a prior trial has some bearing upon his credibility or veracity in a later trial, the trial judge in this case did not give sufficient consideration to the point. Upon defense counsel's representation that Grant must have been convicted after trial, the trial judge concluded, "In other words, he testified and the jury didn't believe him" (Tr. 82). Defense counsel apparently did not know whether Grant had testified at the earlier trial, responding "Perhaps that is what it was" (Tr. 82). Without permitting defense counsel to determine, by consulting with his client, whether Grant had in fact testified that he was not guilty, the trial judge immediately ruled that the prior conviction could be used, "inasmuch as [Grant's] credibility has been clearly tested by the fact that he was found guilty after trial" (Tr. 82).

In short, the trial judge's consideration of the question whether to permit introduction for impeachment of Grant's prior conviction for unauthorized use of a motor vehicle, the same crime for which he was on trial, did not measure up to Gordon's standards. The trial judge failed to determine on the record that the probative value of Grant's prior conviction as to credibility outweighed the inevitable prejudice which revelation of his past crime would cause. He did not determine whether the circumstances of this case indicated strong reasons for disclosure of Grant's prior conviction, and he did not properly consider whether that conviction directly related to Grant's veracity. Grant's conviction of unauthorized use of a vehicle should therefore be reversed.

III. The trial judge's failure, in exercising Luck discretion, to consider the special problem presented by a possible instruction on the inference of guilt from unexplained possession of recently stolen property was plain error.

(The Court's attention is directed to pages 187 and 216-17 of the reporter's transcript and Appendix I to this brief.)

When the Luck issue was raised at the close of the Government's case, it was not clear that the prosecutor regarded an instruction on the inference of guilt from unexplained possession of recently stolen property to be important with respect to the charge of unauthorized use of a vehicle. There was testimony that Grant had entered Mrs. Briguglio's car, removed it from the 1300 block of Franklin Street, N. E., and operated it (Tr. 43-44, 62). The prosecutor may have been content to rest his case on the basis of this testimony. On the other hand, it was clear that an instruction on the inference of guilt from unexplained possession of recently stolen property would be permissible. Before closing argument, the trial judge announced that he would give it sua sponte (Tr. 187).

Less than a year after Luck was decided, this Court had occasion to emphasize that the trial judge's discretion must be exercised with particular care in cases where inferences arising from unexplained acts assume significance, Smith v. United States, 123 U.S.App.D.C. 259, 359 F.2d 243 (1966). On appeal from a conviction of unauthorized use of an automobile, Smith challenged an instruction on the inference from unexplained possession

of recently stolen property. Because he had not testified at the trial, Smith argued, the trial judge should have spelled out to the jury that it was not required to infer guilt from possession even if no explanation were forthcoming. This Court ruled that reversal of the conviction was not required, but it observed (123 U.S.App.D.C. at 260-61, 359 F.2d at 244-45):

> Appellant did not take the witness stand to explain the possession as contemplated by the second part of the [possession] instruction. To the extent that this was a decision motivated by fear of the impeaching effect of prior convictions, appellant's alleged guilt of the crime immediately charged against him may have been largely fixed by his proven guilt of other and past crimes. This suggests that, where inferences founded upon unexplained acts are likely to be heavily operative, the court's discretion to let the jury hear the accused's story, unaccompanied by a recital of his past misdeeds, may play an important part in the achievement of justice. See Luck v. United States, 121 U.S.App.D.C. 151, 348 F.2d 763 (1965). That discretion was not, however, invoked in this trial, which antedated Luck.

This Court later pointed out in Gordon that the defendant's testimony assumes acute importance in relation to impeachment of his credibility "where an instruction relative to inferences arising from unexplained possession of recently

stolen property is permissible." 127 U.S.App.D.C. at 348 n. 11, 383 F.2d at 941 n. 11.

In a trial involving the charge of unauthorized use of a vehicle, the likelihood of an instruction on the inference of guilt from unexplained possession of recently stolen property presents most defendants with Hobson's choice. The instruction approved by this Court in such cases advises the jury that although guilt might be inferred from possession of the vehicle, the inference cannot be drawn if the defendant has satisfactorily explained his possession. Bray v. United States, 113 U.S.App.D.C. 136, 141, 306 F.2d 743, 748 (1962); accord, Pendergast v. United States, No. 21,031, Slip Opinion 19-20 (D.C.Cir., decided Jan. 31, 1969). Because the defendant's possession of a stolen vehicle is an integral part of the Government's case, it will have been established by prosecution witnesses. Thus the defendant who wishes to testify that he did not have possession of the stolen vehicle, or wishes to explain his possession of the stolen vehicle, must in almost every case take the witness stand to avoid the inference.

In these circumstances, exercise of Luck discretion by the trial judge "to let the jury hear the accused's

story, unaccompanied by a recital of his past misdeeds" will ordinarily play a far more important part in the achievement of justice than any benefit to be derived from impeachment. See Smith v. United States, 123 U.S.App.D.C. at 260-61, 359 F.2d at 244-45; cf. Brown v. United States, 125 U.S.App.D.C. 220, 223 n. 9, 370 F.2d 242, 245 n. 9 (1966). When an instruction on the inference of guilt from unexplained possession of recently stolen property is permissible and the trial judge is advised that the prosecutor intends to impeach the defendant with evidence of prior convictions, the trial judge should call upon the prosecutor to choose one course or the other--obtain the instruction or impeach through prior convictions--but not both. Cf. Suggs v. United States, ___ U.S.App.D.C. ___, 391 F.2d 971, 976-77 (1968).

This course of action would have been particularly appropriate in this case. When the Luck issue was raised, defense counsel informed the trial judge that "The defense in this case is the defense that he was not the man" (Tr. 80). Because defense counsel had requested forthwith subpoenas for his witnesses, it should have been apparent that Grant's testimony was crucial to explain his conduct.

At that point, assuming Grant's prior conviction for the same crime was otherwise admissible, the trial judge should have inquired whether an instruction on the inference of guilt from unexplained possession of recently stolen property was considered important to the Government's case. If it was considered important, the trial judge should have called upon the prosecutor to choose between the instruction and impeachment of Grant's testimony through his prior conviction.

Defense counsel failed to bring to the attention of the trial judge, when the Luck issue was raised, the problem presented by the possible instruction on the inference of guilt from unexplained possession of recently stolen property. He failed to object to the instruction before or after it was given.

Although Gordon imposed upon defense counsel the burden of invoking Luck discretion by the trial judge,* this Court ruled in (Lawrence) Jones v. United States, ___ U.S.App.D.C. ___, 402 F.2d 639, 643 (1968): "[O]nce

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* 127 U.S.App.D.C. at 346, 383 F.2d at 940; accord, Evans v. United States, ___ U.S.App.D.C. ___, 397 F.2d 675, 678-79 (1968); Hood v. United States, 125 U.S.App. D.C. 16, 18, 365 F.2d 949, 951 (1966).

the defense has brought the [Luck] issue before the judge, even though the burden of persuasion remains on the defendant, there is a duty upon the judge to make sufficient inquiry to inform himself of the relevant considerations." See Evans v. United States, ___ U.S.App. D.C. ___, 397 F.2d 675, 681 (1968) (dissenting opinion of Bazelon, C.J.); Lewis v. United States, 127 U.S.App. D.C. 115, 381 F.2d 894 (1967); Stevens v. United States, 125 U.S.App.D.C. 239, 240, 370 F.2d 485, 486 (1966) (dissenting opinion of Fahy, J.). The possibility of an instruction of recently stolen property was a "relevant consideration" which should have been the subject of inquiry by the trial judge sua sponte. His failure to consider the matter raises a serious question of fundamental fairness and is a ground for reversal under FED.R. CRIM. P. 52(b). See Suggs v. United States, ___ U.S.App.D.C. ___, 391 F.2d at 976-77.

CONCLUSION

For the reasons set forth above, this Court should reverse Grant's conviction of petit larceny and unauthorized use of a vehicle.

Respectfully submitted,

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June 9, 1969.

APPENDIX I

MR. KEMP (Defense counsel): Your Honor, one other question. That is on the Luck ruling. The defendant intends to take the stand in this case.

THE COURT: Very well.

What you wish to say to me is as to why his record should not come into evidence.

MR. KEMP: Well, your Honor, I think the record that I am aware of that the Government intends to use against the defendant is similar to the charge before the Court, one of a conviction of unauthorized use. It may be highly suggestive, and the jurors may feel or come to the conclusion that since the defendant was convicted of this offense once before, he more than likely would do it again.

In keeping with the spirit of the Luck case and, I think, the latter case, the Gordon case, which came up from

the Court of Appeals upstairs, I would ask your Honor to exclude that on the grounds it would be highly prejudicial to the defendant in this case, since it is an unauthorized use. I think it is in 1966. Is that the date on it, Mr. Harris? Is that the date on the conviction?

MR. HARRIS (Prosecutor): No, it is later than that.

MR. KEMP: '67?

MR. HARRIS: The date of the arrest is 10/4/66. The date of the sentence is 11/3/67.

MR. KEMP: And, the date of the conviction?

MR. HARRIS: I assume that the conviction was shortly before. The sentence is not immediate usually.

MR. KEMP: Your Honor, I think that would be prejudicial.

THE COURT: That submission to me, Mr. Kemp, says that where a man decides to confine his criminal pursuits to car stealing, which is what this man has been doing, then, he can stand trial without his record coming in if he just continues to steal cars.

Now, I don't read the Gordon case or the Luck case as saying that. That in effect says, if that were the rule, as boldly as you state it to me, it would say that any criminal who decides to become a specialist in a particular

field of felony can with assurance continue to testify without regard to his record coming in. I don't think that is the rule.

Now, the Government has a list of convictions here to show that this man has been involved in car theft and car tampering, and that apparently is the way he has occupied some of his time. I don't think the fact that this is what he does is decisive under Luck and Gordon as to whether I should let this single conviction that the Government wishes to use come in. What is his defense?

MR. KEMP: Well, your Honor, that is what I was about ready to say in addition to what I have already said. The defense in this case is the defense that he was not the man. That will go to credibility.

THE COURT: Yes, but he is not a sole witness. He has other witnesses. I have issued forthwith subpoenas for four other witnesses, and he was in the company of two other people. He doesn't have to take the stand to negative the testimony of the officers.

MR. KEMP: No, but it is our intention to have the defendant take the stand in his own behalf.

THE COURT: I understand that. He has every right to do it, but my point is, this is not a case where the only

person who can defend for the defendant is the defendant himself. He was with two other people, one of them seventeen years old. He can take the stand. You have known who they were and where they were and all about them ever since you were in this case.

MR. KEMP: No, I didn't know.

THE COURT: You should have, because they were all arrested together and went to juvenile authorities.

MR. HARRIS: Mr. Kemp also represented the defendant at the preliminary hearing.

THE COURT: Yes.

MR. KEMP: Well, communication between client and attorney is privileged, and I wouldn't want to --

THE COURT: I don't want you to, sir.

MR. KEMP: What I was about to say, your Honor, on this question of the record, now the type of offense of which the defendant was convicted before is larceny of a car, which involves questions of honesty, integrity and veracity, which would weigh heavily on the credibility of the defendant if he testifies in this case.

THE COURT: Exactly.

MR. KEMP: I think that is what the Court could use its discretion in. I am asking the Court to not put that in --

not let the Government bring that record in, because it would weigh heavily on the defendant's credibility. I think this may resolve in a question of which side they are going to believe.

THE COURT: Was he convicted after trial, or was he convicted by a plea of guilty.

MR. KEMP: I am sure it was after trial, because it went to the Court of Appeals. I don't think he could have gone up there if he had pleaded guilty.

THE COURT: In other words, he testified and the jury didn't believe him.

MR. KEMP: Perhaps that is what is was.

THE COURT: I am going to permit the prior conviction to be used by the prosecution if the defendant takes the stand. It is the Court's view that this is a discretionary matter as Mr. Kemp says. I believe inasmuch as the defendant has other witnesses available to him on his defense, inasmuch as his credibility has been clearly tested by the fact that he was found guilty after trial, and that the matter is a recent felony, which should come in through evidence, and I will give the appropriate instructions at the proper time.

We will take five minutes.

(A short recess was taken.)

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United States Court of Appeals
for the District of Columbia Circuit

FILED JUL 23 1969

Nathan J. Paulson
CLERK

REPLY BRIEF FOR APPELLANT

IN THE

UNITED STATES COURT OF APPEALS

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 22,732

United States of America, Appellee,

v.

Perry A. Grant,
A/K/A Johnny A. Scott, Appellant.

Robert M. Kennan, Jr.
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Attorney for Appellant
(Appointed by this Court)

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TABLE OF CASES AND OTHER AUTHORITIES

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* Cases or authorities chiefly relied upon are marked by asterisks.

ARGUMENT

Introduction

Appellant has urged that the trial judge abused his Luck discretion in admitting evidence of Grant's prior conviction for unauthorized use of a motor vehicle to "affect his credit as a witness" under D.C. Code § 14-305 (1967). Grant's prior conviction was the same crime for which he was on trial in this case. This Court's Gordon decision therefore directed the trial judge to determine with some care on the record whether the value of impeaching Grant's testimony through that conviction far outweighed its inevitable prejudice to him. Gordon further directed the trial judge to determine that the circumstances of this case indicated strong reasons for disclosure of Grant's prior conviction, and that the prior conviction directly related to veracity. Gordon v. United States, 127 U.S.App. D.C. 343, 347, 383 F.2d 936, 940 (1967), cert. denied, 390 U.S. 1029 (1968). On the basis of assertions unsupported by the record, the Government argues that the trial judge met Gordon's standards. The only point requiring rebuttal relates to the Government's confusion of "credibility" and "veracity."

I. This Court's Luck decisions do not use "credibility" and "veracity" synonymously; they hold that only a prior conviction directly relating to veracity may be introduced to impeach the credibility of a defendant on trial for the same crime.

The Government's Brief appears to use the terms "credibility" and "veracity" interchangibly (see note 4 and text accompanying notes 5 and 7). The terms are not synonymous. WEBSTER'S NEW INTERNATIONAL DICTIONARY (3d. Ed. 1961) defines "credibility" to mean "the quality or power of inspiring belief . . . worthiness of belief," whereas "veracity" is defined to mean "devotion to truth: truthfulness." Similarly, the term "credibility" in this Court's Luck decisions has a meaning quite different from "veracity."

Luck directs the trial judge, in exercising his discretion to admit evidence of a prior conviction for impeachment purposes, to determine whether "the prejudicial effect of impeachment far outweighs the probative relevance of the prior conviction to the issue of credibility" Luck v. United States, 121 U.S.App. D.C. 151, 156, 348 F.2d 763, 768 (1965). (Emphasis added.) When the Luck issue is raised, the trial judge is thus initially confronted with the question whether the defendant's prior conviction may be meaningful for the jury

in assessing his worthiness of belief or, in the language of D.C. Code § 14-305 (1967), his "credit as a witness." Many factors may be relevant to this determination, including the nature of the prior crime (whether it was an act of dishonesty or an act of violence), the length of the criminal record, the age and circumstances of the defendant, and the nearness or remoteness of the prior conviction.

This Court recognized in Gordon that another factor may be the defendant's veracity, his truthfulness. Observing a difference between a conviction that involved guilt by a plea and a conviction by a jury after the defendant had "affirmatively contested" the charge, this Court stated, "In the latter situation, the accused puts his own veracity in issue when he testifies so that the jury's verdict amounted to a rejection of his testimony; the verdict is in a sense a de facto finding that the accused did not tell the truth when sworn to do so." 127 U.S.App.D.C. at 347 n. 8, 393 F.2d at 940 n. 8. (Emphasis added.) Again, in discussing the "special problem [that] arises when a prior conviction is for the same or substantially the same conduct for which the accused is on trial," this Court stated as a general guide that impeachment by way of a similar crime should

be limited to a single conviction "and then only . . . where the conviction directly relates to veracity." Ibid. (Emphasis added.)

II. Grant's prior conviction for unauthorized use of a motor vehicle did not directly relate to his veracity.

It may be assumed that the term "veracity" in this Court's Gordon decision had its commonly accepted meaning, "truthfulness." Thus a conviction that "directly relates to veracity" may be a conviction for a crime involving an element of lying or one in which the jury has chosen to disbelieve the defendant's testimony.*

Many of the crimes included in Gordon's category of acts "universally regarded as conduct which reflects adversely on a man's honesty and integrity" involve an element of lying. Perjury and forgery are obvious examples. Others may be found in the crimen falsi, conviction for which at common law rendered one

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* Appellant's Brief (pp. 19-20) points out that the "guilty verdict" test appears inconsistent with Gordon's "rule of thumb" distinguishing between crimes of dishonesty and crimes of violence for purposes of determining a prior conviction's relevance to credibility. The inconsistency would be diminished if this Court would make it clear that the guilty verdict has relevance only after the trial judge has determined that the prior crime was one involving dishonest conduct.

incompetent to testify. See Note, The United States Court of Appeals for the District of Columbia Circuit, 1966-67 Term, Criminal Law and Procedure, 56 GEO. L.J. 58, 118 (1967); 1 WHARTON'S CRIMINAL LAW AND PROCEDURE (1957 Ed., R. ANDERSON) 63. Stealing, however, does not involve an element of lying and thus does not directly relate to veracity, as Judge Wright noted in (Roy) Jones v. United States, ___ U.S.App.D.C. ___, 404 F.2d 212, 216 (1968) (concurring opinion). Nor does unauthorized use of a motor vehicle, a form of stealing, involve an element of lying. Because a conviction for unauthorized use of a motor vehicle is thus not directly related to veracity, it is not a conviction that may be introduced to impeach the credibility of a defendant on trial for the same crime.

Whether or not there is merit in the proposition that a jury's rejection of a defendant's testimony in a prior trial has some bearing upon his credibility or veracity in a later trial, the trial judge in this case did not determine that Grant had in fact testified at his prior trial. The record (Tr. 82) is perfectly clear. There was no foundation for the trial judge to determine that Grant's prior conviction directly related to his veracity.

Conclusion

Because Grant's prior conviction for unauthorized use of a vehicle was not directly related to veracity, it should not have been introduced to impeach his credibility in a later trial for the same crime. The trial judge, in permitting Grant's prior conviction to be introduced for impeachment purposes, exceeded his Luck discretion. Grant's conviction for unauthorized use of a motor vehicle should therefore be reversed.

Respectfully sumbitted,

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July 23, 1969.

ADDENDUM

The Government asserts that it is not necessary for this Court to review Grant's conviction for petit larceny because Grant received a concurrent sentence on that count, citing Hirabayashi v. United States, 320 U.S. 81 (1943). If this Court should reverse Grant's conviction for unauthorized use of a motor vehicle, it would necessarily reach the question whether there was sufficient evidence to support his conviction for petit larceny. If, however, this Court affirmed Grant's conviction for unauthorized use of a motor vehicle, the "concurrent sentence doctrine" enunciated in Hirabayashi and other cases might be used to preclude review of the petit larceny conviction.

The continued validity of the concurrent sentence doctrine was cast in doubt by the Supreme Court's recent decision in Benton v. Maryland, 37 U.S.L.W. 4623 (U.S. June 23, 1969). Although the doctrine has been used by this Court for at least forty years (see Zerega v. United States, 59 U.S.App.D.C. 67, 69, 32 F.2d 963, 965 (1929)), significant inroads have been made upon it*. See Kee v. United States, No. 21,853 (D.C. Cir., decided April 1, 1969); (Roy) Smith v. United States, 118 U.S. App.D.C. 235, 237 n.2, 335 F.2d 270, 272 n.2 (1964);

Baber v. United States, 116 U.S.App.D.C. 358, 362, 324 F.2d 390, 394 (1963); Nelms v. United States, 94 U.S. App.D.C. 267, 268, 215 F.2d 678, 679 (1954).

This Reply Brief has not dealt with the concurrent sentence doctrine because substantial issues are raised concerning Grant's conviction for unauthorized use of a motor vehicle. At oral argument, however, Counsel for Appellant will move for leave to file a Supplemental Brief with respect to the validity of the concurrent sentence doctrine, if this Court should deem it necessary or appropriate.